IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 389 of 1993

in

SPECIAL CIVIL APPLICATIONNo 511 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL and

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

C.D. CHOKSHI

Appearance:

Mr.S.T.Mehta, AGP for Appellant

MR IS SUPEHIA for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE P.B.MAJMUDAR

Date of decision: 23/12/1999

ORAL JUDGEMENT

(Per:Majmudar.J)

#. This is an appeal under clause 15 of the Letters Patent filed by the State of Gujarat challenging the judgment dated 5.7.1993 passed by the learned single Judge in SCA No.511 of 1990 by which order dated 30.7.1988 retiring the respondent compulsorily from service passed under clause (aa)(i)(1) of Rule 161 (1) of BCSRs 1959 is set aside and the appellant is directed to reinstate the respondent in service with back wages to be worked out on the basis of observations made therein.

#. The respondent- original petitioner was born on 4.3.1938. He was appointed as an Overseer a class-III post on 5.1.1961 and thereafter was promoted to the higher post of Executive Engineer on adhoc and temporary basis by an order dated 18.10.1985 . By the impugned order dt. 30.7.1988 he was compulsorily retired from Government service at once in the interest of public service in accordance with clause (aa)(i)(1) of Rule 161(1) of BCSRs 1959 and paid three month's notice pay and allowance in lieu of notice period as laid down under clause (aa)(i) of the aforesaid Rules. This order was challenged by the respondent by filing Special Civil Application No. 511 of 1990 on several grounds. However,at the time of hearing of the petition, the original petitioner had challenged the impugned order only on one ground, namely that since he was promoted to the post of Executive Engineer on adhoc and temporary basis, he could not have been subjected to compulsory retirement but could have been only reverted to the substantive post from which he was promoted on adhoc and and temporary basis.

#. In order to substantiate his say, the respondent had relied upon the judgment of the Supreme Court in the case of Union of India etc. vs. K. R.Tahiliani & anor. AIR 1980 SC 953 . The learned single Judge dealt with this plea in para 3 of the judgment and after relying upon the judgment of the Honourable Supreme Court in the case of Union of India (Supra) held that as the respondent was promoted to the post of Executive Engineer on ad-hoc and temporary basis, he had no right to the post and therefore, he could not have been retired compulsorily from service. In view of this conclusion, the learned Single Judge allowed the petition by the impugned judgment, giving rise to this appeal. We may observe that operation of the judgment of learned single Judge

which is impugned in the appeal has been stayed during the pendency and final hearing of the appeal.

#. At the time of hearing of the appeal Mr. S.T.Mehta, learned AGP for the State has submitted that the learned single Judge committed an error of law in relying upon the decision of the Supreme Court in the case of Union of India (Supra) as in the said case, the Supreme Court was concerned with Rule 56(j)(i) of the Fundamental Rules whereas in this case, interpretation of Rule 161(1) of BCSRs. 1959 arises which is substantially different from Rule 56(j(i) of Fundamental Rules. It was also argued by Mr. Mehta that in any case the decision of the Supreme Court in the case of Union of India (Supra) is overruled in the case of A.L.Ahuja vs. Union of India reported in AIR 1987 1907 and therefore, the appeal should be allowed.

#. As against the aforesaid argument, Mr. Supehia, learned advocate for the respondent strongly supported the judgment of the learned single Judge and in the alternative submitted that he should be permitted to argue other points which were averred in the petition but not raised before the learned single Judge.

#. We have heard the learned advocates of both the sides at length. The learned single Judge has based the judgment on the decision of the Supreme Court in K.R.Tahiliani (Supra) . In the said case, on the basis of the interpretation of the Rule 56(j)(i) of the Fundamental Rules, the Supreme Court came to the conclusion that if the person is appointed to a particular post, on officiating basis or temporary basis, he has no right to the said post and in such eventuality, the Government servant can be reverted back to his original post but could not be compulsorily retired from service. However, so far as the provisions of Rule 161(1)(a) of the BCSRs 1959 are concerned, they are totally different from the aforesaid Rule 56(j)(i) of the Fundamental Rules. In order to resolve the controversy involved in the petition, it would be necessary to reproduce Rule 161(1) which is as under:

" 161(1)(a) Except as otherwise provided in the other clauses of this rule, the date of compulsory retirement of a Government servant other than a Class IV servant, is the date on which he attains the age of 58 years

Provided-

(i) deleted
(ii) deleted
(iii) He may be retained in service after the date of compulsory retirement only with the previous sanction of Government on public grounds which must be recorded in writing.

(aa) Notwithstanding anything contained in clause (a)

(i) An appointing Authority shall, if he is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant to whom clause (a) applies by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice:

(1) if he is in Class-I or Class-II service or post or in any unclassified gazetted post, the age limit for the purpose of direct recruitment to which is below 35 years, on or after the date on which he attains the age of 50 years, and

(2) if he is in any other service or post, the age limit for the purpose of direct recruitment to which is below 40 years, on or after the date on which he attains the age of 55 years;

(ii) any Government servant to whom clause(a) applies may, by giving notice of not less than three months, in writing to the Appointing Authority, retire from service after he has attained the age of 50 years, if he is in Class-I or Class-II service post or in any unclassified gazetted post, the age limit for the purpose of recruitment to which is below 35 year and in any other case, after he has attained the age of 55 years.

Provided that it shall be open to the Appointing Authority to withhold permission to retire to a Government servant who is under suspension, or against whom Departmental proceedings are pending or contemplated and who seeks to retire under this sub-clause"

(b) A Government servant in Class-IV service should be required to retire at the age of 60 years. He may not be retained in service after

that age, except with the sanction of Government.

(c) The following rules are applicable to particular service.

(i) Except as otherwise provided in this sub-clause, a holder of the post of Chief Judge of the Court of Small Causes, Ahmedabad whether he is recruited directly or is promoted from subordinate post, should ordinarily be retained in service till the age of 60 years, if he continues efficient upto that age other wise he may be required to retire at the age of 58 years or at any time thereafter.

(ii) (1) Except as otherwise provided in this sub-clause, Government servants in the Bombay Services of Engineers, Class-I, must retire on reaching the age of 58 years and may be requested by the Government to retire on reaching the age of 50 years if they have not attained to the rank of Superintending Engineer.

(2) Subject to the requirements of this sub-clause as to reappointment Government may, in special circumstances, which should be recorded in writing, grant an extension of service not exceeding three months to a Chief Engineer.

(3) No Chief Engineer shall, without re-appointment hold the post for more than five years, but re-appointment to the post may be made as often and in each case for such period not exceeding five years, as Government may decide, provided that the term of reappointment shall not extended more than three months beyond the date on which he attains the age of 58 years (Officiating service,unless followed by confirmation without interruption in such service, does not count towards the period of five years mentioned in this sub-claused.

(iii)Stipendary patels appointed under section 16 of the Land Revenue Code 1879 and section 5 of the Village, Police Act, 1867 may be required to retire at the age of 58 years but should ordinarily be retained in service if they continue efficient upto the age of 60 years, extensions of service after that age should not be granted except in cases where no other suitable person is available or when a patel's

work is specially good provided the patel concerned is considered to be still fit for service.

(iv) The Principal Judge, Ahmedabad City Civil and Sessions Court, should be required to retire on attaining the age of 60 years.

(v) The Chief Metropolitan Magistrate for metropolitan area of the city of Ahmedabad should ordinarily be retained in service till the age of 60 years if he continues efficient upto that age, otherwise he may be required to retire at the age of 58 years or at any time thereafter."

There are in all six Notes appended to Rule 161(1). They should be reproduced here.

Note 1.- The grant under Rule 753 of leave extending beyond the date upon which a Government servant must compulsorily retire or beyond the date upto which a Government servant has been permitted to remain in service shall be treated as sanctioning an extension of service upto the date on which the leave expires.

Note 2.- When a Government servant is required to retire, or cease to be on leave on attaining a specific age, the day on which he attains that age is reckoned as a nonworking day and the Government servant must retire, or cease to be on leave, as the case may be with effect from and including that day.

Note.3.- Notwithstanding anything contained in clause (c) Government may grant an extension of service to any Government servant beyond the age of 55 years or in very special circumstance beyond 60 years, on public grounds, which must be recorded in writing.

Note 4.-Clause(a) and (b) of this rule apply to all Government servants to whom the Bombay Civil Services Rules as a whole apply whether they be holding temporary or permanent posts substantively or in an officiating capacity, when a Government servant holding a permanent post substantively is officiating in any other post, this rule should be applied according to the character of the post in which he is officiating

and not according to the character of the permanent post held substantively by him. Thus,. the date of compulsory retirement of the substantive holder of a post in Class IV service who is officiating in a post not included in that service is the date on which he attains the age of 55 years if such a person would like to be governed by clause (b) of this rule he must revert to a post in Class IV service before he attains the age of 55 years.

Note.5- Rule 161 is generally applicable to re-employed personnel and the rules in section IX of Chapter XI are subject to conditions laid down in this rule. Rule 330 from the nature of its concession and conditions puts the re-employment of a person in receipt of a superannuation or retiring pension in a special class outside Rule 161 and subject to the conditions stated in the rule itself which must be observed with every renewal of sanction.

Note.6.- Government servant who while in Government service is appointed as a Chairman/Member of a Public Service Commission, shall hold office for the full term prescribed in the Constitution of India even though he attains the age of compulsory retirement according to the service to which he belonged during his tenure as Chairman/Member of the Commission.

A bare reading of the above quoted Rule makes it manifest that clauses (a) and (b) of the rule apply to all Government servants to whom the Bombay Civil Services Rules as a whole apply whether they are holding temporary or permanent posts substantively or in an officiating capacity. In view of the provisions of Note 4 which we have quoted above a Government servant who is holding the post on officiating basis or even on adhoc basis can be compulsorily retired from service. Therefore, we agree with the submission of Mr.Mehta that language of Rule 161(1(a) of the said Rules being different from that of Rule 56(j)(i) of the Fundamental Rules, the decision in Union of India (supra) should not have been relied upon by the learned single Judge and could not have been made applicable to the facts of the present case. The Scheme of Rule 161(1)(a) is entirely different and it takes care of an employee who is holding the post on adhoc or officiating basis. In that view of the matter the judgment and order of the learned single Judge cannot be

sustained and is liable to be set aside. Even otherwise, it is also required to be noted that aforesaid decision of the Supreme Court rendered in Union of India (Supra) has been overruled by the Supreme Court in the case of A.L.Ahuja(Supra). The Supreme Court, in its judgment in the case of A.L.Ahuja(Supra) while dealing with the decision rendered in Union of India (Supra) has observed in paras 8 and 9 as under:

"8. There is no reference to officiating service in sub-cl(i)). The relevant words used in sub-cl(i)) are "if he is in Class-I or class-II service or post" A person can be in Class I or Class II service or post even when he holds a post of either class substantively or temporarily or on officiating basis. Instances are abundant where officers are promoted to Class I or Class II service or post of such class on officiating basis and such officiation lasts for a number of years. Officiating promotion certainly does not confer a right to the post and at any time the Government servant may be sent back to his substantive post. There is, however, no reason why sub-cl. (i) should be confined to service or post held on substantive basis. Learned counsel for the petitioner does not dispute the position that a person who is in class I or Class II service or post is in such service or post as covered by sub-cl. (i) The possibility of such incumbent being sent back to the substantive post is not at all relevant in the matter of exercising powers of compulsory retirement. If the officiation is not brought to an end by reverting the government servant to his substantive post before the power of compulsory retirement is exercised, the Government servant concerned must be taken to be in Class I or Class II service or post at the relevant time and would come within the ambit of sub-cl(i)). There is no warrant for the conclusion that officiating Government servants in Class I or Class II service or post are outside the purview of sub-cl.(i). the possibility of a reversion to the substantive post is not germane to the exercise of power contained in F.R.56. The purpose of Fundamental Rule 56(j) is to confer power on the appropriate authority to compulsorily retire Government servant in the public interest and the classification of Government servants into two categories covered by the sub-cls.. (i) and (ii) has a purpose

behind it. If the condition indicated in sub-cl. (i) is satisfied, namely, the Government servant is in Class I or Class II service or post and he had entered into service before attaining the age of 35 years, and has attained the age of fifty, the further condition that he must substantively belong to the two classes of service or post cannot be introduced into the scheme. The purpose of the sub-clauses is to classify Government servants into two categories and sub-cl.(i)takes within its sweep those Government servants who at the relevant time are in Class I or Class II service or post, whether substantively temporarily or on officiating basis.

9. We would accordingly hold that the ratio of the decision in Tahiliani's case is not correct and sub-cl. (i) of R. 56(j) applies to Government servants in Class I or Class II service or post on substantive, temporary or officiating basis."

#. Thus as per the aforesaid judgment of the Supreme Court in the case of A.L.Ahuja (Supra) Rule 56(j) sub.cl.(i) of the Fundamental Rules applies to Government servant in Class-I or Class-II service or post held by him on substantive, temporary or officiating basis. Aforesaid judgment in the case of A.L.Ahuja(Supra) was not brought to the notice of the learned single Judge. With the result that the learned single Judge relied upon the judgment of the Supreme Court in the case of Union of India (Supra) which was no longer a good law when the learned single Judge delivered his judgment. As decision in case of Union of India (Supra) is no longer a good law, the impugned judgment cannot be sustained.

#. The Supreme Court has also considered the provisions of Rule 161(1)(a) of BCSRs 1959 in the case of N.C.Dalwadi vs. State of Gujarat reported in AIR 1987 SC 1933. In the aforesaid case, the appellant before the Supreme Court was an officer of the Bombay Service of Engineers, Class I in the erstwhile State of Bombay and was promoted to the post of Executive Engineer. In July 1965 when the post of Superintending Engineer fell vacant the State Government promoted him to officiate as Superintending Engineer in the Gujarat Service of Engineers, Class I until further orders. On account of of meritorious service as Superintending Engineer the appellant was put in charge of the Minor Irrigation

Project Circle. The work undoubtedly was of a highly specialised and skilled nature and officers of merit and proven ability, skill and competence were usually posted on that post. The appellant of that case had excellent record of service without any blemish and earned encomiums for his meritorious service in his new capacity. In 1966 the Chief Engineer, Public Works Department addressed a letter to the appellant communicating the State Government's appreciation of the valuable work which the appellant and the officers and staff under him had put up during the scarcity relief operations in that year. However, the State Government on September 13,1967 purported to compulsorily retire him under the first proviso to R. 161(1)(a) with effect from December 15,1967 after giving him 3 months notice on his attaining the age of 55 years on November 12,1970. Normally he would retired as a Superintending Engineer on November 12,1970 the date on which he was to attain the age of 58 years. It was the case of the appellant before the Supreme Court that there was no adverse entry in any of the Confidential Reports questioning his integrity or his efficiency or ability for retention in service. He therefore, challenged the said order before the High Court by way of a petition under Article 226 of the Constitution. The learned single Judge of this Court relying upon the decision of the Division Bench of this Court in the case of Ishwarlal Kasanji Naik vs. State of Gujarat (1963) 4 GLR 945 held that since the appellant had not attained the substantive rank of a Superintending Engineer, he could be made to retire at any time under Rule 161(1)(c)(ii)(1) . The judgment of the learned single Judge was upheld in Letters Patent Appeal . While allowing the appeal of the employee,the Supreme Court in the aforesaid decision has observed in paras 8,9 and 10 as under:

"8. Age of superannuation is an incident of government service, it is for the benefit of the employee who earns a well earned rest with or without pensionary benefits for the rest of his life. It is common to all permanent civil servants; it depends on an event that inevitably happens by passage of time unless the employee dies earlier or resigns from the point. We must give to the different clauses of R.161(1) which find place in Chapter IX headed "Compulsory Retirement" their plain ordinary meaning in furtherance of the object and purpose with which they have been framed. Under R. 161(1)(a) compulsory retirement of all government servants is at the age of 58 years which is the general

provision. But the same cannot be said of compulsory retirement before the age of superannuation. It is not an incident of the tenure; it is not conceived in the interests of the employee; it is a mode of terminating his employment at the discretion of the appointing authority. The words 'except as otherwise provided in the other clauses of this rule' appearing in R. 161(1)(a) make the general rule of superannuation at the age of 58 years subject to other clauses of that rule. That is to say the Government is empowered to provide for different ages of compulsory retirement for different classes of government servants. absolute power of the Government to direct the premature retirement of a government servant on the date on which he attains the age of 55 years or at any time thereafter. R.161(1)(c) is the special, rule framed for that purpose. To illustrate, R.161(1)(c)(i)(1) says that except provided in that sub-clause, holders of posts of the Chief Judge of the Court of Small Causes, Bombay and the Administrator General and Official Trustee, Bombay whether they are recruited directly or are promoted from subordinate posts should ordinarily be retained in service till the age of 60 years, if they continue efficiently upto that age, otherwise they may be required to retire at the age of 55 years or at any point thereafter. This clearly brings out the there are two ages of superannuation depending upon efficiency, integrity and ability for further retention in service. Similarly, R. 151(1)(c)(ii)(1) deals with another class of officers, namely, government servants in the Bombay Service of Engineers, class I and similarly provides for two ages of superannuation. The first part of sub-cl.(1) adopts the general rule (sic) contained in R. 161(1(c)(ii)(1) for that class of officers as provided in R.161(1)(a), namely, that they shall retire on the date on which they attain the age of 58 years. The second part however confers power on the Government to retire any such officer on his reaching the age of 50 years. Such power of the Government to direct premature compulsory retirement of these officers is subject to a qualification. The words" if they have not attained to the rank" of Superintending Engineer read in conjunction with the opening words 'except as otherwise provided in this

sub-clause" clearly carve out an exception in the case of persons holding the posts of Superintending Engineers. The words ' if they have not attained the rank' of Superintending Engineer R.161(1)(c)(ii)(1) are plainly bad English and must be read as 'if they have not attained the rank of' of Superintending Engineer. The word used in that rule is 'rank' and not 'substantive rank' and there is no reason why it should not be understood according to its ordinary sense as meaning grade or status, particularly when it is preceded by the words 'have not attained the rank' The word "attained" means acquired or reached. The word 'rank'has both a narrower as well as a wider meaning.

9. A question may arise as to the purport and effect of these rules. The effect of R.161(1)(a) which is the general rule dealing with all government servants except with respect to the enumerated categories and of R.161(1)(c)(ii)(1) which is a special rule dealing with government servants belonging to Bombay Service of Engineers, Class I is the same; the difference is only superficial which lies more in clever drafting than in their content.

The Government may terminate the services of a permanent government servant under the first proviso to R. 161(1)(a) at any time on or after he attains the age of 55 years after giving three months notice i.e. before the normal age of superannuation, by way of compulsory retirement. It will be noticed that the power of the Government under the first proviso to direct premature retirement does not exist on its satisfaction that it is necessary to do so in the public interest. It is unlike Fr 56(j) to that extent. The Government may terminate the services of a government servant belonging to the Bombay Service of Engineers, Class I under R. 161(1)(c)(ii)(1) at the age of 50 years without giving him any notice. Arbitrariness is writ large in both the rules but the rules enable the Government to deprive a permanent civil servant of his office without enquiry. The power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be real cause for taking action. Both violate Art.31(2) of the Constitution. Prima-facie it appears to us that the first proviso to R. 161(1)(a) was on

lines of FR 56(j) and could be sustained on the strength of the decision in Union of India vs. J.N.Sinha (1971) 1 SCR 791 (AIR 1971 SC 40) being based on the ground that the compulsory retirement of a particular government servant was in the public interest but the words "in the public interest' are not therein R.161(1)(c). In J.N.Sinha's case it was laid down that the appropriate authority has the absolute right to retire a government servant if it is of the opinion that it is in the public interest to do so. The right conferred on the appropriate authority is an absolute one. That power can be exercised subject to the conditions mentioned in the rules, one of which is the concerned authority must be of the opinion that it is in the public interest to do so. If that authority bonafide forms that opinion, the correctness of that opinion cannot be challenged before Courts. It is however open to an aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that it is an arbitrary decision. Compulsory retirement involves no civil consequences. The aforementioned FR 56(j) is not intended for taking any penal action against government servants. That rule merely embodies one of the facets of the "pleasure doctrine" embodied in Art.310 of the Constitution. It was said (at P.43 of AIR)

"There is no denying the fact that all organisations and more so in government organisations, there is good deal[of dead wood. It is in the public interest to chop off the same. Fundamental Rule 565(j) holds the balance between the rights of the individual government servants and the interest of the public. While a minimum service is guaranteed to the government servant, the Government is given power to energize its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest."

These considerations do not arise either under first proviso to R. 161(1)(a) or under sub cl.(1) to R. 161(1)(c)(ii) because the concept of public interest is not there.

10. It seems to us that on a proper construction of R. 161(1)(c)(ii)(1) which is

identical to R.3.26(c)(1) of the Punjab Civil Service Rules, the word 'rank' in the collocation of the words "if they have not attained to the rank of Superintending Engineer R. 161(1)Ic)(ii)(1) must in its context and setting has to be construed in its wider sense as meaning status or grade, and if so regarded, the second part of that rule must be treated as an exception of the special rule empowering the Government to direct superannuation of such officers on the date they attain the age of 50 years. This has been the view expressed by the Court in S.C.Jain's case (AIR 1986 SC 169) but we find it difficult to support the conclusion that the words 'if they have not attained the rank of Superintending Engineer in R. 161(1)(c))(ii)(1) confer an immunity on Superintending Engineers from being compulsorily retired at any age below the normal age of superannuation at 58 years. Under the scheme of the Rules the benefit which the Superintending Engineers enjoy under the second part of R. 161(1)(c)(ii)(1) is necessarily subject to the absolute power of the Government to direct compulsory retirement of such officers on the date they attain the age of 55 years under the first proviso to R. 161(1)(a) or under FR 56(j)(1) on which is based. Although the words 'in the public interest' are not there but such power to direct premature compulsory retirement at the age of 55 years can be exercised subject to the conditions indicated in col. J.N.Sinha's case, one of which is that the concerned authority must be of the opinion that it is in the public interest to do so.

We are not oblivious of the fact that the construction that we put on the word 'rank' in R.161(1)(c)(ii)1) does not accord with the view expressed by the Court in Tahiliani's case (AIR 1980 SC 953) that FR 56(j) is meant to cover only those who are in a post on a regular basis i.e. in a substantive capacity and not on an officiating basis only. It proceeds ion the principle that the constitutional provision under Art.311(2) protecting a government servant from reduction in rank without hearing refers only to a person who is occupying a higher post in a substantive capacity, for which he along has a legal right to occupy the post. The Court laid down while interpreting FR 56(j) that a person who is occupying a higher post in an officiating

capacity has no such right and can be deprived of his post by the competent authority. The facts are not clear from the judgment in Tahiliani's case. From the passage extracted above, it is clear that the Court laid down that when a government servant belonging to a Class-I or Class-II service or post on a regular basis has to be retired compulsorily, the Government can fall back on FR. 56(j). It however held that FR 56(j) is meant to cover only those who are in a post on a regular basis i.e. in substantive capacity and not on an officiating basis only. If that be so then we are at a loss to understand why a person who has not attained the rank of Superintending Engineer i.e. is merely officiating as Superintending Engineer cannot be compulsorily retired from his substantive post of Executive Engineer if the other requirements of FR 56(j) are fulfilled. We need not dilate on this aspect further inasmuch as the State Government in the return filed before the High Court stated that it only intended and meant to act under the first proviso to R.161 (1)(a) and not under R. 161(1)(c)ii)(1). It is averred in the return that the case of the appellant was reviewed and it was decided to compulsorily retire from on his attaining the age of 55 years. There is no material placed to show that such compulsory retirement was necessary in the public interest. The appellant has had an unblemished record and there were nothing against him to doubt his integrity, fitness and competence. In somewhat similar circumstances this Court in H.C.Gargi vs. State of Haryana (1986) 4 SCC 158 (AIR 1971 SC 40) struck down the order of compulsory retirement under R. 3,25(d) of Punjab Civil Services Rules, observing.

" The power of compulsory retirement under Rule 3.25(d) of the Rules can be exercised subject to the conditions mentioned in the rule, one of which is that the concerned authority must be of the opinion that it is in public interest to do so. The test in such cases is public interest as laid down by this Court in Union of India vs. J.N.Sinha (AIR 1971 SC 40) It does not appear that there was any material on the basis of which the State Government could have formed an opinion that it was in public interest to compulsorily retire the appellant at the age of 57 years. There was really no justification for his

compulsory retirement in public interest"

There is no reason for us to make a different view in the facts and circumstances of the present case. The impugned order of compulsory retirement of the appellant purporting to be under the first proviso to R.161(1)(a) of the Rules must therefore, be struck down as arbitrary."

From the above quoted paras of the judgment of the Supreme Court, it is evident that an officer holding the rank on officiating or adhoc basis can be considered while exercising the powers under Rule 161(1)(a) of the said Rules for retiring an officer compulsorily from service. In the instant case the respondent was holding the post of Executive Engineer on adhoc and officiating basis and therefore, in our opinion, the Government was perfectly justified in exercising the powers under Rule 161(1)(a) of the said Rules. Therefore also the claim advanced by Mr. Supehia cannot be upheld.

#. Having been confronted with this situation Mr. Supehia tried to argue the case on other points which he had not raised before the learned single Judge. The learned single Judge in para 3 of his judgment has observed that " Mr. Supehia learned advocate for the petitioner while challenging the impugned order has raised several contentions in the memo of petition, however, at the time of final hearing, he has pressed into service only one contention, which according to him, goes to the root of the matter as the same is directly covered by the decision of the Supreme Court." Mr. Supehia at the time of hearing of this appeal argued that as a matter of fact, the learned single Judge was of the opinion that the matter could be allowed on the point which was argued by Mr. Supehia and that it was not necessary therefore, to go into other points and he was not allowed to argue other points by the learned single Judge. We are afraid, we cannot accept this argument of Mr. Supehia. As stated above, the learned single Judge, in terms has stated in his judgment that Mr. Supehia had argued only on one point. It is therefore, not open for Mr. Supehia to argue contrary to the record and contrary to the statement of fact recorded by the learned single Judge in his judgment. At this stage it would be advantageous to refer to the observations made by the Supreme Court in the case of State of Maharashtra vs. Ramdas Shrinivas Nayak & anor. AIR 1982 SC 1249. The observations are as under:

"The Court is bound to accept the statement of the Judges recorded in their judgment as to what transpired in court. It cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done and said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the fact so stated that no one can contradict such statements by affidavit or other evidence. If a party thinks that the happening in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice, but he may not call in question the very fact of making the concession as recorded in the judgment."

In view of the aforesaid observations of the Supreme Court it is clear that a statement of fact as to what happened or transpired at the hearing of the matter recorded in the judgment of the Court are conclusive of the facts so stated and no one can contradict such statement by affidavit or other evidence. Therefore, there is no manner of doubt that the learned advocate for the original petitioner had given up all the points and pressed into service only one point which according to him was covered by the judgment of the Supreme Court rendered in the case of Union of India vs. K.R.Tahiliani & anor. AIR 1980 SC 953 . It is true that the appellate Court may permit a litigant in rare and appropriate cases to resile from a concession on the ground that the concession was made on wrong appreciation of law and had caused great injustice . But in the instant case it is not shown that the concession was made on wrong appreciation of law. The concession which is recorded by the learned single Judge has not led to gross injustice.

It is well settled principle of law that a party to a litigation cannot approbate and reprobate. If the learned advocate for the appellant is permitted to agitate other points mentioned in the original petition it would amount to permitting him to blow hot and cold which is not permissible under the law. Therefore, we have not permitted Mr. Supehia to argue other points which were specifically given up by him before the learned single Judge.

##. In view of the provisions of law explained above, we are of the opinion that the judgment and order of the learned single Judge cannot be sustained. Accordingly this LPA is allowed. The judgment and order of the learned single Judge impugned in the appeal and reported in 1994 (1) GCD 154 (Guj) in the case of C.D.Chokshi vs. State of Gujarat is set aside. The Special Civil Application filed by the respondent is dismissed . There will be no order as to costs althrough out.